

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
445 12<sup>th</sup> Street, W.W., TW-A325  
Washington, DC 20554

ET Docket No. 02-135

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In the Matter of

Issues related to the Commission's  
Spectrum Policies  
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Use Administrative Law Judges to Adjudicate  
Interference Disputes Between Licensees

Coleman Bazelon  
Vice President  
Analysis Group/Economics

Address: 1747 Pennsylvania Avenue, N.W.  
Washington, DC 20006  
Phone: (202) 530-3982  
Fax: (202) 530-0436  
E-mail: [cbazelon@analysisgroup.com](mailto:cbazelon@analysisgroup.com)

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These comments respond most directly to questions 1, 2.e and 15 of the public notice.

I support all efforts by the Commission to use more market oriented mechanisms to manage the radio spectrum. The Comments of 37 Concerned Economists got it right when they said, “The Commission should eliminate all wireless license requirements unrelated to interference or anti-competitive concentration.”<sup>1</sup> Any reforms that create better defined rights in radio spectrum will advance this goal. To this end, the Commission should establish specialized Administrative Law Judges with the requisite expertise needed to adjudicate interference disputes between licensees.

### The Need for Better Defined Rights in Radio Spectrum

Legally, a property right is “a right of use or disposition which will be enforced by the court.”<sup>2</sup> Practically, a property right is a right to use or disposition that will be enforced. It is in this latter sense that the Commission, through its own actions under its own current authority, can extend the rights that licensees<sup>3</sup> enjoy. Legally, radio spectrum is owned by the public<sup>4</sup> so the Commission can not give away complete property rights in it. They can, however, establish pseudo-property rights where licensees can decide how to use and dispose of their spectrum. This “if it quacks like a duck” approach will promote many of the benefits of market management while sidestepping the emotionally charged issue of who actually owns the radio spectrum.<sup>5</sup>

In the case of radio spectrum, the typically least well defined portion of the property right is interference. Historically, the FCC has addressed concerns about licensees interfering with each other by strictly limiting how all licensees can use their spectrum. If instead, the bundle of rights associated with a radio spectrum license defined a measurable level of interference that each licensee had to tolerate, then interference in excess of the established level could be dealt with as any other trespass. It is the lack of these well defined interference levels that a licensee must accept that is the main roadblock today to more efficient use of the radio spectrum.

### A Framework for Adjudicating Interference Disputes

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<sup>1</sup> Comments of 37 Concerned Economists, *In the Matter of Promoting Efficient use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230.

<sup>2</sup> David T. Bazelon, *The Paper Economy: A Radical Clarification of the Structure of Our Economy, and of the Myths and Superstitions which Support it*, Random House, New York, 1963, p. 49.

<sup>3</sup> Unlicensed uses and users and non-exclusive licenses to use radio spectrum raise important issues. In principle, however, these users could be given standing before a proceedings with an Administrative Law Judge with, perhaps, a separate set of standards to guide the adjudication.

<sup>4</sup> Communications Act of 1934, as amended.

<sup>5</sup> For more on introducing market mechanisms in radio spectrum see, Congressional Budget Office, *Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management*, April 1997, Chapter Five.

**Use Administrative Law Judges (ALJs) to adjudicate interference disputes.**

Disputes regarding radio spectrum in general, and interference claims in particular, require a high degree of specific technical knowledge. Consequently, the commission should establish ALJs with a solid background in the engineering issues needed to understand and evaluate the claims that come before the ALJ. This is akin to the use of Special Masters in other legal jurisdictions.

ALJs would settle disputes between licensees. All decisions would be appealable to the full Commission. (This would be required for the Commission to delegate the authority in the first place.) It is at the point of appeal to the full Commission that the value of the newly created rights in radio spectrum would be anchored. If the Commission would defer to the expertise of its ALJs and refrain from interfering in the process then the precedent of the ALJs would gain substance over time.

**ALJs would need standards for resolving disputes.** These could be developed by the ALJs as they adjudicated cases. A better solution would be for the Commission to establish a set of guiding principles for resolving interference disputes. These principles could include the following

- Priority in use. An incumbent licensee or established user would have the expectation that a new user would not be able to interfere with them without explicit action by the Commission in reallocating spectrum
- Past practices. How an incumbent user uses radio spectrum will be relevant in establishing the acceptable level of interference. Under this approach, for example, the installed base of radio receivers and their interference tolerance levels would be taken as given.
- Efficiency in use. The overall efficiency of how a portion of spectrum is used could be a factor in determining the level of interference a licensee would have to accept.

The important thing is that shared expectations develop about licensee's rights associated with their radio spectrum licenses. Only then can market forces move radio spectrum from lower valued uses to higher valued uses.